

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. KEN.-14-313

STATE OF MAINE

Appellee

v

MARK MURPHY

Appellant

ON APPEAL FROM THE KENNEBEC COUNTY SUPERIOR COURT

BRIEF OF APPELLEE

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FACTS AND PROCEDURAL HISTORY

Mark Murphy was charged by indictment with two counts of Class A Elevated Aggravated Assault, 17-A M.R.S.A. §208-B(1)(A) & (B), and one count of Class B Aggravated Assault, 17-A M.R.S.A. §208 (1)(A). On September 4, 2013, he filed a waiver of jury trial, and the Superior Court (Kennebec, Marden, J.) held a bench trial on October 1, 2013. He was found guilty of all counts. On June 23, 2014, Murphy was sentenced on count one to fifteen years, all but ten years suspended, and two years probation; on count two to five years, all suspended, and two years probation; and on count three to two years all suspended, and two years probation. All of the sentences, including periods of probation, were to be served concurrently. (A 28, 29.)

Taking the evidence in the light most favorable to the State, *see State v. Johnson*, 2014 ME 83, ¶ 2, 95 A.3d 621, the trial court could have found that on March 16, 2013, Murphy was a patient at the Riverview Psychiatric Center (Riverview) in Augusta, having been committed there by Order of Court after a finding of Not Criminally Responsible. His victim, Jamie Hill-Spotswood, was a mental health worker employed by Riverview. In the days leading up to the assault, Murphy had become angry because a planned trip to visit his parents had been canceled by Riverview staff, and other privileges that he had been granted by the staff had been curtailed or withdrawn.

On the day before the assault, Robert Lamoreau, program services director at Riverview had called Murphy into a meeting of Murphy's treatment

team to tell him that the planned visit to Murphy's parents the next day would be canceled and re-scheduled. (Tr. 14, 15.) Murphy expressed his displeasure with that decision, and at one point gave Lamoreau the finger. (Tr. 15.) Zachary Smith, a physician assistant who was present at that meeting observed that Murphy was angry and thought the team's decision was unfair. (Tr. 43, 44.) He added that Murphy's concerning behavior which prompted the cancellation of the trip was erratic (Tr. 48, 49), and that sometimes Murphy's reactions would be based in reality and sometimes on delusions. (Tr. 50.)

At some point on the morning of the next day, Murphy requested a copy of his medical records from Riverview nurse Margaret Todd-Brown, and after she told him how to proceed, Murphy subsequently submitted a written request for them. (Tr. 63.) Following that, Todd-Brown denied him permission to go on an off ground walk, (Tr. 64, 65) and as she was speaking with him about this he abruptly returned to his room. (Tr. 63, 64.)

Hill-Spottswood, was doing 15 minute checks on residents, working her way down a hallway of one of the hospital wings. In the past, Murphy had told Riverview nurse Madeline Orange that he did not like Hill-Spottswood (Tr. 131) and did not like having her on the floor. (Tr. 132.) As she made her way towards the end of the hall she walked by Murphy's room and he came out of his room and looked at her, then walked towards the bathroom. (Tr. 93, 94.) She continued towards the end of the hall, and as she was standing at a bathroom door, knocking, she could feel someone behind her breathing down

her neck. (Tr. 95, 96.) At that point she turned around and saw Murphy standing there. He looked at her and said "I'm sorry Jamie," and began hitting her. She ended up in a corner of the hallway in a fetal position, and Murphy continued to hit her. (Tr. 96, 97.) She screamed for help, and yelled at Murphy to please stop. She covered her face and head with her hands as she was being struck. Todd-Brown heard Hill-Spottswood screaming something like "Mark, no" several times. (Tr. 65, 67, 68.) At this point, Todd-Brown and another staff person ran down the hallway towards the incident, having been preceded there by mental health worker Rayanne Vigue, and saw Murphy hitting Hill-Spottswood. (Tr. 68.)

Vigue was in the area when the assault occurred and heard Hill-Spottswood yelling her name. She looked down the hallway and saw Hill-Spottswood down in a fetal position in a corner of the hallway. Murphy was on his knees in front of Hill-Spottswood swinging at her. (Tr. 110.) Vigue had not worked with Murphy very much because he had threatened her in the past. (Tr. 114.) Vigue ran down the hall to help and was inadvertently knocked to the floor by Murphy as he was swinging at Hill-Spottswood. Murphy then turned to look at Vigue and came at her but a patient interposed and subdued Murphy, who then stopped struggling. (Tr. 111.) Hill-Spottswood saw Murphy fall to the floor, and as she testified "At that point, I knew he was down and it was over." (Tr. 98.) At some point after Murphy was subdued, Vigue saw a pen in Murphy's hand which was what he had used as a weapon. (Tr. 113.) The pen

was one issued by Riverview and not one Hill-Spottswood carried on her person. (Tr. 103, 104.)

Hill-Spottswood was taken to the hospital by her husband and was treated in the emergency room. Her injuries included an abrasion to her forehead, which had since scarred over; a cut under her eye where a residual mark remains, and wounds to her right hand as a result of being stabbed there. (Tr. 100.) When she arrived at the emergency room, Dr. Harry Grimnitz, an emergency room physician at Maine General Medical Center, treated Hill-Spottswood. Her right hand was swollen and tender and she was unable to flex her hand to make a fist, so Dr. Grimnitz requested x-rays to determine if there were any fractures. This revealed a metallic foreign body in her hand which he was unable to remove after making an incision. The object turned out to be a pen tip, which was so deeply embedded in her hand that an orthopedic surgeon was summoned repair the injured hand. (Tr. 56, 57, 101.). Following that first operation in March 2013, Hill-Spottswood began receiving occupational therapy two to three times a week, which therapy was continuing at the time of trial in October 2013. (Tr. 102, 104.) In addition to the therapy needed to try to regain full use of her hand, she was trying to regain some of the strength in that hand. (Tr. 102, 104.) At one point during the therapy, the area of injury to her hand puffed up, and different therapies were not successful in resolving that, and she experienced a clicking feeling in her hand. She was eventually referred back to the surgeon, and it was determined that a cylinder shaped object still remained in her hand which required additional surgery. (Tr. 102.)

Right after the assault Murphy was administered sedating medication, and when staff checked on his well being after the medication was administered, Murphy flashed both his middle fingers at them. (Tr. 69.) According to Todd-Brown, in the days following the assault, Murphy remained angry at staff for cancelling his trip. (Tr. 72.) Four days after the assault Murphy was still angry and referred to the pass process as a game. (Tr. 137-139.) At one point a day or two after the assault, the staff wanted to enter the seclusion unit Murphy was in to assess him. When asked if he would work with them, Murphy replied "Oh yeah, I'm working" and removed his shirt and moved a mattress to the side of the wall and postured at them with closed fists, and continued to blame the staff for the cancellation of his trip. (Tr. 70-72.)

Two days after the assault, Madeline Orange and Dr. Carolyn Criss, Murphy's treating psychiatrist at Riverview, met with Murphy. (Tr. 154.) Dr. Criss's working diagnosis for Murphy was Schizoaffective Disorder, bipolar type, personality disorder, some PTSD and paranoia, although the etiology of the paranoia was difficult to determine. (Tr. 154 - 156.) At the meeting, Murphy told Dr. Criss that he did not remember the incident with Hill-Spottswood. (Tr. 127.) He offered no explanation for the assault. (Tr. 157, 158.) He was angry that his weekend pass had been canceled. (Tr. 156.) Dr. Criss noted at the time that Murphy did not appear psychotic, but added that her encounter with him had been brief and it was possible he could have been. (Tr. 158, 159.) She demurred at trial when asked if she had an opinion about Murphy's ability to act intentionally or with criminal responsibility at the time

of the assault. (Tr. 159, 160, 166.) Ultimately, Dr. Criss stated that Murphy's behavior regarding criminal responsibility should be examined by forensic experts on a case by case basis taking individual circumstances into account. (Tr. 182.)

Dr. Andrew Wisch was called to testify about his examination of Mr. Murphy, as well as his opinion about Murphy's state of mind at the time of the assault on Hill-Spottswood. He began by noting that he had examined Murphy in the past in connection with allegations of criminal conduct, and had concluded that Murphy had not been criminally responsible. (Tr. 185-187.) He then said he had examined Murphy in connection with these events on June 28, 2013, at the Maine State Prison. (Tr. 187.) Interestingly, Murphy told Dr. Wisch that he was substantially less anxious at the prison than he had been at Riverview. Dr. Wisch reviewed Murphy's mental health diagnosis for the court, and then recounted his discussion with Murphy about the events leading up to his assault on Hill-Spottswood. (Tr. 189-193.) Dr. Wisch thought that the fact that Murphy's memory of events leading up to the assault was consistent with the observations of the staff demonstrated that Murphy was not in a severe psychotic state at that time. (Tr. 193, 194.) He did point out however that in his view, Murphy experienced what he called low grade psychotic symptoms most of the time, consisting of misperceptions about people slighting him. (Tr. 194.) When Dr. Wisch asked Murphy about the assault on Hill-Spottswood, Murphy told him that while in his room, he had gotten the idea that he needed to marry her, and after ruminating about this for some time he came out of his

room and found that she was there. He knew she was married to someone else, so in order to be able to marry her he needed to kill her, which would then somehow free her up so he could then marry her. Asked about his statement to her that he was sorry, made just before the assault, Murphy explained he meant he was sorry he was taking her away from her husband and making her his, and expressly denied he was apologizing in advance for hurting her. (Tr. 195-197.) Dr. Wisch testified he was skeptical of that version of events in part because he generally does not accept self-reported information uncritically, and there was no corroborating information of such a delusion in the days prior to or subsequent to the assault in any of the documentation at Riverview. (Tr. 198, 199.) Nor was there any documentation supporting such a delusion in the records of the Maine State prison where Murphy had been transferred after the assault. (Tr. 200.) The documentation he reviewed described only Murphy's anger at the restrictions that had been placed upon him. As a result, he interpreted that apology as having its more simple and obvious meaning. (Tr. 199.) Dr. Wisch further explained his methodology when doing forensic examinations, (Tr. 202) and in particular what impressed him in the circumstances of this case. (Tr. 202, 203.) This approach was consistent with Dr. Criss' earlier observation that a proper forensic examination should be done on a case by case basis and involve a consideration of, among other things, the circumstances of and surrounding the incident, to include the conduct and verbalizations of the person being examined. Dr. Wisch's opinion was that at the time he assaulted Hill-Spottswood, Murphy was able to engage

in intentional or knowing conduct, (Tr. 203) and that he had the capacity to appreciate the wrongfulness of his conduct. (Tr. 204.)

After the State rested its case in chief, the Court inquired of defense counsel how many witnesses Murphy would have. Counsel replied that he would call only Dr. Carlyle Voss. While Dr. Wisch was skeptical of Murphy's description of his thought process just before his assault of Hill-Spottswood, Dr. Voss, who saw Murphy for the first time on June 29, 2013, (Tr. 241) reached the opposite conclusion. Although Dr. Voss believed that Murphy had the ability to manipulate information and 'make up' a story like that, he did not think he was doing that. (Tr. 235, 236.) Dr Voss testified that in his opinion Murphy's ability to appreciate the wrongfulness of his conduct was severely impaired, (Tr. 224) but conceded that his opinion depended upon the truth of Murphy's explanation for the assault, (Tr. 239) which explanation he agreed emerged for the first time anywhere in late June when Murphy met with Drs. Wisch and Voss. (Tr.241.)

ISSUES

- I Whether there is any basis on this record for the Court to find that Murphy knowingly and voluntarily waived his right to testify.
- II Whether the remedy for Murphy being subject to Double Jeopardy is for the Court to merge the counts.
- III Whether the finding that Murphy was criminally responsible was supported by evidence in the record.
- IV Whether the evidence supported the trial court's finding that the State proved that Murphy caused serious bodily injury to Jamie Hill-Spottswood.

SUMMARY OF ARGUMENT

I. There is no evidence in this record from which this Court can conclude that Murphy's right to testify was infringed. Although the matter was not expressly addressed in open court, Maine law does not require the trial court to question a represented defendant about whether he will exercise his right to testify. *State v. Ford*, 2013 ME 96, ¶¶ 19-22, 82 A.3d 75. Whether a defendant testifies is a decision that is made with the advice of counsel. *Id.* ¶ 21. In this case, where the real issue was Murphy's state of mind at the time of the assault, it would certainly not be unreasonable for him to conclude, after consulting with counsel, that his testimony regarding the incident, and his state of mind, had already been presented to the Court through the testimony of Drs. Wisch and Voss, and that his mental health history and his current mental health diagnosis had been discussed for the trial court by Drs. Criss, Wisch and Voss. Thus it would be reasonable for him to conclude that he stood to gain little from testifying, except to be cross-examined.

II. The issue of Double Jeopardy is reviewed *de novo*. *State v. Labbe*, 2009 ME 94, ¶ 2, 979 A2d 693. Among the protections provided by the Double Jeopardy Clause is the protection against multiple punishments for the same offense. *Id.* ¶4. The State concedes that counts one, two and three were based on the same conduct. The remedy is for this Court to merge the counts post verdict and direct the Superior Court Clerk accordingly. *See State v. Robinson*,

1999 ME 86, ¶ 15, 730 A.2d 684. The case does not need to be remanded for resentencing.

III. When considering a challenge to the trial court's finding on criminal responsibility, this Court reviews the evidence, and any reasonable inferences that may be drawn from it, most favorably to the result reached by the trial court. *State v. Gurney*, 2012 ME 14, ¶ 44, 36 A.3d 893. A finding made by the trial court that is adverse to the party with the burden of proof will be overturned only if the record compels a contrary conclusion. *Id.* ¶46. The record in this case does not compel a conclusion contrary to that reached by the trial court.

Once the State had established that Murphy's acts in assaulting Hill-Spottswood were intentional, knowing or reckless, it was Murphy's burden to prove by a preponderance of the evidence that at the time he assaulted her, as a result of a mental disease or defect, he lacked the substantial capacity to appreciate the wrongfulness of his conduct. (17-A M.R.S.A. §§ 39(3), 101(2)). The evidence demonstrated that Murphy was angry at being recently denied a pass and privileges rather than experiencing a self-reported death/resurrection/marriage delusion. His statement "I'm sorry Jamie" to Hill-Spottswood just as he was about to assault her demonstrates that he was able to recognize both her and the fact that what he was about to do to her was wrong.

IV. The evidence in the record supports the trial court's finding that Murphy caused serious bodily injury to Hill-Spottswood. The Court views the evidence in the light most favorable to the State to determine whether the fact-finder could rationally find beyond a reasonable doubt every element of the offense charged. *State v Treadway*, 2014 ME 124, ¶ 8_---A3d ---. Dr Grimnitz testified, particularly with regard to the injury to Hill-Spottswood's right hand, that an x-ray revealed the presence of a metallic object embedded into her hand, which had penetrated so deep that he could not remove it with the incision he was able to make, and therefore had to refer her to an orthopedic surgeon for treatment. Additionally, Hill-Spottswood testified that she later had to undergo a second surgery to remove a second pen fragment from her hand, and as of the time of trial some six months later, was still requiring occupational therapy to regain maximum use of that hand. She also testified that she had not yet regained full strength in that hand.

ARGUMENT

I. There is no basis in the record for this Court to conclude that Mr. Murphy did not knowingly and voluntarily waive his right to testify.

From the fact that nothing was placed on the record at trial regarding Murphy's decision whether to testify, he wants this Court to conclude that he must not have knowingly and voluntarily waived his right to testify. He asks the court to infer that fact from an absence of evidence. Maine law is not in accord, *Ford*, 2013 ME 96, ¶¶ 18-23, 82 A3d 75. When a defendant is represented by counsel, this Court will assume that the defendant was properly advised by counsel of the right to testify unless evidence exists to the contrary. *Id.* ¶ 21.

Murphy does not cite any record evidence to support the conclusion that he was not properly advised by counsel of his right to testify or not. The only reference in the record to Murphy's right to testify, which could at best be considered an indirect allusion to this issue, occurred after the State had rested its case in chief. At that point, the Court inquired of defense counsel how many witnesses he intended to call, and counsel replied only Dr. Voss. (Tr. 220.)

There was a very plausible reason why, after conferring with his counsel, Murphy would have decided not to testify. His mental health history and mental health condition at the time of the assault would be presented to the Court through the testimony of Drs. Criss, Wisch and Voss. Likewise, Drs. Wisch and Voss, during their testimony, repeated Murphy's version of events

and his mental processes as he had related those to them when they interviewed him. It is not unreasonable to think that, after conferring with counsel, Murphy would have concluded that, if he was able to put this information before the court through them, it would not be to his advantage to take the witness stand to repeat what the trial judge had already heard, and then be cross-examined. Accordingly, there is no reason for this Court to conclude that Murphy did not knowingly waive his right to testify.

II. This Court should merge counts two and three into count one.

The State agrees that counts one, two and three are based upon one criminal act, and therefore the counts should be merged post verdict, *State v. Bellavance*, 2013 ME 42, ¶ 21, 65 A.3d 1235. The State does not believe that the matter needs to be sent back to the Superior Court for sentencing. See *State v. Robinson*, 1999 ME 86, ¶ 15, 730 A.2d 684. When it is clear from the sentencing transcript that the court contemplated that it was sentencing for only a single act, then this Court may correct the error by consolidating the counts into a single count. *Id.* The trial judge was clear that the sentence of fifteen years, all suspended but ten, with two years probation was for count one, and the sentences of five years and two years were for counts two and three respectively. (sentencing transcript pp. 40, 42)

III. The trial court's decision finding that Murphy did not prove by a preponderance of the evidence that because of a mental disease or defect he lacked substantial capacity to appreciate the wrongfulness of his conduct was not unreasonable.

The fact that a person has a mental disease or defect is not conclusive on the issue of criminal responsibility. Although it is a relevant piece of information, the ultimate question is whether, because of that mental disease or defect, a person lacked the substantial capacity to appreciate the wrongfulness of his criminal conduct at the time he engaged in that conduct. 17-A M.R.S. § 39(1). The defendant carries the burden of proving this by a preponderance of the evidence. (17-A M.R.S.A. §§ 39(3), 101(2)). And it is well settled that ultimately, it is up to the fact finder to make the final assessment of a defendant's criminal responsibility based upon the totality of the evidence, and the weight given by the fact finder to the various components of that evidence. *State v. Gurney*, 2012 ME 14, ¶¶ 44-46, 36 A.3d 893; *State v. Ellingwood*, 409 A.2d 641, 643-644 (Me. 1979).

The testimony presented by the State from the staff at Riverview was that the defendant was angry that weekend because he had been denied a weekend pass by Riverview staff. Zachary Smith and Robert Lamoreau both testified that Murphy thought the decision was unfair, and Lamoreau noted that Murphy flashed a middle finger at him after he announced the team's decision to Murphy. (Tr. 15) Additionally, the next morning, Murphy asked to go out for a walk which he was normally allowed to do, but this time was denied by nurse Margaret Todd-Brown, and abruptly returned to his room. (Tr. 63, 64.)

Shortly after that he assaulted Hill-Spottswood. (Tr. 65.) After the assault, Murphy was sedated but continued to display his anger at the staff. Reminiscent of the gesture he had made to Lamoreau the day before, this time he flashed both middle fingers at staff when they checked on his well being following the sedation, and either a day or two after the assault he postured at Todd-Brown with closed fists. (Tr. 71.) He was still angry when Dr. Criss saw him two days after the assault, blaming the staff for his cancelled trip. (Tr. 72.) The testimony of Todd-Brown (Tr. 60), Madeline Orange (Tr. 125) and Mary Owen (Tr. 136) made it evident that Murphy's anger at the staff did not subside much over the next few days following his assault on Hill-Spottswood. Madeline Orange testified that on March 18, while discussing the canceled trip, Murphy was angry and said the thought staff messed with him and take things away from him and that causes him to become derailed. (Tr. 126-129.) Mary Owen recalled a conversation with Murphy on March 20, during which, red faced, he was still angrily denouncing the unfairness of the denial of his passes. (Tr. 138, 139.)

The testimony of Rayanne Vigue (Tr. 108) also cast doubt on Murphy's self reported claim, three months later, that a killing/resurrection/marriage delusion was what caused him to attack Hill-Spottswood. Vigue testified that when she tried to help Hill-Spottswood during the assault, she inadvertently bumped Murphy, who then turned on her and was about to assault her before he was subdued by another resident. (Tr. 111.) Surely he was not preparing to attack her because of any similar "romantically" based delusion since he did

not like her, and had in the past threatened to rip out her throat. (Tr. 114.) Likewise, Murphy's claim that he wanted to marry Hill-Spottswood is inconsistent with the testimony of Madeline Orange who testified that Murphy had told her he did not like Hill-Spottswood, and did not like having her on the floor. (Tr. 131, 132.)

Drs. Wisch and Voss agreed on much about Murphy. They differed on the issue of whether his mental disease substantially impaired his ability to appreciate the wrongfulness of his conduct. (Tr. 204, 229.) He pointed to grandiosity as an explanation, although he conceded that he found no support for such a diagnosis in Murphy's history. (Tr. 251.) Dr. Voss also noted that Murphy had the ability to manipulate information to make up a story like the one he was telling him and Dr. Wisch. (Tr. 235, 236.) Nonetheless, his opinion was premised in large part upon the belief that Murphy's story about a death/resurrection/marriage delusion was true. (Tr. 236, 237, 253.) Also, Dr. Voss agreed that if one disbelieved Murphy's explanation, then anger would certainly be a plausible explanation for his assault on Hill-Spottswood. (Tr. 245, 246.) Dr. Wisch on the other hand was skeptical of that story which he said found no support in the patient notes pertaining to Murphy before or after the incident. Until June, when he was interviewed by Drs. Wisch and Voss, Murphy never expressed any attraction towards Hill-Spottswood before the assault, or subsequent disappointment that he was not able to marry her. (Tr. 241.) In fact, Murphy had told Madeline Orange that he did not like Hill-Spottswood and did not like having her on the floor. (Tr. 131, 132.) All he talked about

after the assault on her was his anger at being denied passes for the weekend of the assault. Also to be considered by the fact finder was the incongruity of Murphy's admitted paranoia and his claimed motive in attacking Hill-Spottswood.

Dr. Wisch noted as he was reviewing Murphy's diagnostic history that there had been some discussion about antisocial personality features in addition to diagnoses of mental disorders. (Tr. 189, 190, 191.) In listening to Murphy's account of the events leading up to the assault, he noted that Murphy's recall of those events was corroborated by other information, which led him to believe that Murphy was not then psychotic. (Tr. 193, 194.) As for Murphy's proffered explanation for his assault, Dr. Wisch was not as readily convinced of its veracity as was Dr. Voss. Dr. Wisch said that he looked for information that corroborated Murphy's self report, and found none, and noted that Murphy's statements immediately after the incident were about how angry he was about the restrictions placed upon him. (Tr. 198, 199.) Nor was there any support for Murphy's version of events in later records compiled at the Maine State Prison. (Tr. 200.) Dr. Wisch also explained why he looks for such corroborating information when he does an assessment for criminal responsibility. (Tr. 201, 202.) Essentially what he said was that he looks for corroborating information to try to determine how to evaluate what a defendant tells him about his or her mental processes at the time of the criminal conduct. In particular he examines the behavior and words of a person around the time of criminal conduct because such information is likely to be less guarded and

less likely to be motivated by the self interest that may accompany a defendant's recounting of events to someone whom the defendant knows is examining him or her to evaluate criminal responsibility. Also telling for purposes of Dr. Wisch's diagnosis was the fact that Murphy recognized Hill-Spottswood, and apologized to her for what he was about to do to her, leading him to conclude that he appreciated the fact that it was wrong. (Tr. 205.)

Although there was some competing testimony, there is record support for the fact-finder's determination that Murphy was able to appreciate the wrongfulness of his conduct. The record does not compel a result contrary to that reached by the trial court on this issue. *See Gurney*, 2012 ME 14, ¶ 46, 36 A.3d 893.

IV. There was sufficient evidence to support the court's finding of aggravated assault.

Count one charged Murphy with intentional or knowing Elevated Aggravated Assault, 17-A M.R.S.A. § 208-B (1)(A), count two charged him with depraved indifference Elevated Aggravated Assault, 17-A M.R.S.A. § 208-B(1)(B), and count three charged him with Aggravated Assault 17-A M.R.S.A. § 208(1)(A). All three counts alleged serious bodily injury.¹

This court has addressed the issue of what constitutes serious bodily injury in at least two cases, *State v. Frost*, 564 A.2d 70 (Me. 1989) and *State v. Bowman*, 611 A.2d 560 (Me. 1992). In *Frost*, the Court held that a person who had fractures of the nose that prevented him from breathing through his nose, even temporarily, and required corrective surgery, had suffered serious bodily injury. In *Bowman*, the Court found that the fact that the victim had to be treated (it is unknown exactly what the treatment consisted of) for her injuries over a two month period, satisfied the "extended convalescence" portion of the definition of "serious bodily injury," even though the evidence was that her injuries were 90% healed eight days after they were inflicted. In that case there was no evidence that the victim needed surgical intervention in order to be restored to physical health.

In this case, Dr. Grimmnitz testified that Hill-Spottswood's right hand was swollen and she was unable to make a fist, so he requested an x-ray which

¹ "Serious bodily injury" means a bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or loss or substantial impairment of the function of any bodily member or organ, or extended convalescence necessary for the recovery of physical health." 17-A M.R.S.A. § 2(23).

revealed a metallic foreign body in that hand. (Tr. 56.) The incision that he was able to make was insufficient to enable him to remove the object because of the depth of the penetration, so he called in an orthopedic surgeon to remove the object. (Tr. 56, 57.) Hill-Spottswood testified that she underwent two surgeries to remove completely the pieces of pen that had been embedded in her hand during Murphy's assault (Tr. 100, 102) , and that as of the time of trial (more than six months later) she was still receiving extensive occupational therapy two to three times a week in an attempt to regain full use of that hand (Tr. 102), and said she still did not have full strength back in that hand. (Tr. 104.) Like the *Frost* case, the pen fragment had to be surgically removed for her to be able, hopefully, to eventually use her hand in a normal fashion. And if eight days for almost complete healing, and two months of treatment in the form of visits to the doctor constituted "extended convalescence" in *Bowman*, then so does more than six months of extensive occupational therapy two to three times a week in this case.

Here, the trial court could find the element of serious bodily injury beyond a reasonable doubt.

CONCLUSION

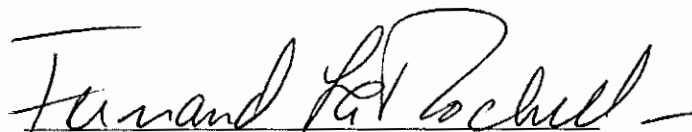
For all of the foregoing reasons, Murphy's conviction should be affirmed.

December 19, 2014

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Fernand LaRoche", with a long horizontal flourish extending to the right.

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